92-1078

No. _____

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLYDE BOUDREAUX, FIRST LIEUTENANT, UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Clyde Boudreaux, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 24, 1992.

OPINIONS BELOW

The opinions of the United States Court of Military Appeals, *United States v. Boudreaux,* 35 M.J. 291 (1992); and *Boudreaux v. United States Navy-Marine Corps Court of Military Review,* 28 M.J. 181 (1989), are reprinted as Appendices A and B.

The opinions of the United States Navy-Marine Corps Court of Military Review, *United States v. Boudreaux,* 33 M.J. 649 (N.M.C.M.R. 1991) (en banc); (*United States v.*

Boudreaux), No. 74-2361S, slip op. (N.M.C.M.R. May 21, 1990); 26 M.J. 879 (N.M.C.M.R. 1988); and *United States v. Boudreaux,* No. 74-2361, slip op. (N.M.C.M.R. Aug. 19, 1975), are reprinted as Appdendices C, D, E, and F.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 24, 1992. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

The pertinent portion of Article II, § 2 is set forth in Appendix G. The text of 10 U.S.C. § 826 is set forth in Appendix H. The text of Rule for Courts-Martial 801 is set forth in Appendix I.

STATEMENT OF THE CASE

Contrary to his pleas, petitioner was convicted by general court-martial of various offenses including five counts of violating a lawful general order, signing a false official statement and false swearing, in violation of 10 U.S.C. §§ 892, 907, and 934, respectively. Thereafter, petitioner was sentenced to dismissal from the United States Marine Corps. On appeal, the United States Navy-Marine Corps Court of Military Review affirmed in part, reversed in part, and authorized petitioner's command to order a rehearing on the case. *United States v. Boudreaux,* No. 74-2361, slip op. (N.M.C.M.R. Aug. 19, 1975).

At the rehearing, petitioner was convicted again on most of the charges and was sentenced to be reprimanded, to pay a fine of $1000 and to lose 2,950 places on the promotion list. The case was then sent directly to the Judge Advocate General of the Navy for review pursuant to Article 69, Uniform Code of Military Justice, 10 U.S.C. § 869. The Judge Advocate General affirmed the conviction and sentence. After lying dormant for ten years, the case was sent to the United States Navy-Marine Corps Court of Military Review for completion of appellate review under Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866, on July 1, 1986. *Id.*

The Court of Military Review, declining to exercise jurisdiction, returned the case to the Judge Advocate General of the Navy for appropriate disposition. 26 M.J. 879, 882 (1988). By writ of mandamus, the Court of Military Appeals directed the Court of Military Review to review the case. 28 M.J. 181, 183 (1989). Ultimately, the Court of Military Reveiw affirmed the conviction and sentence on rehearing. 33 M.J. 649 (1991). Thereafter, the Court of Military Appeals affirmed the decision of the Court of Military Review. 35 M.J. 291, 296 (1992).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATE GENERAL OF THE NAVY IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

Each year, thousands of service members are tried by courts-martial. In fiscal year 1991, for example, there were 2,610 general courts-martial and 5,538 special courts-martial.[1] Annual Report on Military Justice, 34 M.J.

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[1] General courts-martial can impose any authorized sentence including, in some cases, death. 10 U.S.C. § 818 (1988). Special courts-

LVII, CV, CXIX, CXXXII, CXLII (1991). The judges who preside over general courts-martial are, for all practical purposes, the equivalent of United States District Court judges presiding over felony trials. A general court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power."[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue,* 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General. 10 U.S.C. § 826. Placing the power to appoint judges in

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martial, on the other hand, may impose no more than six months' confinement. 10 U.S.C. § 819 (1988). Special courts-martial can, however, sentence service members to be separated with a bad-conduct discharge. *Id.*

[2] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both." 10 U.S.C. § 848 (1988).

such low-level officials[3] raises a serious question under the Appointments Clause.

As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C. § 5148, a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

Two appellate courts have addressed the issue presented. For different reasons, both courts upheld the authority of the Judge Advocates General to appoint military judges. *United States v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992); *United States v. Coffman,* 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam). Neither court, however, correctly decided the issue.

In *United States v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review recognized general court martial judges as officers, not mere employees, of the United States. The Coast Guard Court

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[3] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix J].

held, however, that Congress is not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. 35 M.J. at 572-73, 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo,* 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

The Navy-Marine Corps Court of Military Review has also addressed the issue presented. *See United States v. Coffman,* 35 M.J. 591 (1992) (per curiam). In *Coffman,* the Navy-Marine Corps Court held that the method by which military trial judges are appointed satisfied the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. 35 M.J. at 592. This holding, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer,* he was not appointed by the President *as a judge.* The trial judge in this case had the authority to preside over petitioner's trial *not* because he was a military officer, but because he was filling the office of general court-martial judge. The *independent* judicial authority which military trial judges exercise is quite different from the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States,* 147 U.S. 282 (1893). 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer.*" *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision,* 732 F. Supp.

1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of some other *office*. A general court-martial judgeship is not an appurtenance of some other position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocate General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

The significance of the Appointments Clause defect is magnified by the fact that military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Thus, not only are military trial judges *appointed* by the Judge Advocate General, (they serve at the pleasure of the Judge Advocate General,) who may *remove* them from office.

Giving such low-level officials the power of appointment and removal carries the risk that these powers will be used to advance the parochial interests of the Judge Advocate General.

The appointment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag,* the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo,* 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Despite the fact that this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag,* 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag,* the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia, Glidden Co. v. Zdanok,* 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag,* 111 S. Ct. at 2639.

Finally, this Court has jurisdiction to resolve the Appointments Clause question even though the Court of Military Appeals did not grant review on this issue. The Military Justice Act of 1983, which established the Court's certiorari jurisdiction over the Court of Military Appeals'

decisions, limited this Court's certiorari jurisdiction to cases in which the Court of Military Appeals exercised mandatory jurisdiction, cases certified to the Court of Military Appeals by the Judge Advocate General, cases in which the Court of Military Appeals granted review, and other cases in which the Court of Military Appeals granted relief. Military Justice Act of 1983, § 10(a)(1), 97 Stat. 1405, 1406 (1983) (codified at 28 U.S.C.A. § 1259 (West Supp. 1992)); *see also* 10 U.S.C.A. § 867a (West Supp. 1992). The legislative history of the Military Justice Act of 1983 indicates, "in view of current concerns about the Supreme Court's docket, [this] legislation has been drafted in a manner that will limit the number of cases subject to direct Court review." H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983). Thus, the purpose of the limitation was not to insulate certain issues from review by the Court, but rather to prevent an intolerable increase in the Court's workload. Moreover, the number of cases subject to direct review remains the same regardless of whether the Court's certiorari jurisdiction is limited to issues actually considered by the Court of Military Appeals. Hence, the Court may, in the exercise of its judicial discretion, review any issue in a case which meets 28 U.S.C. § 1259's requirements.

CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges in an official who is statutorily subordinate to the Secretary of a Department? Due to the importance of this issue to the entire military justice system and to the rule of constitutional law, the Court should hear the Appointments Clause issue.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF MILITARY APPEALS.

No. 67,026.
NMCM 74 2361C.

UNITED STATES, APPELLEE,

v.

CLYDE P. BOUDREAUX, FIRST LIEUTENANT,
U.S. MARINE CORPS, APPELLANT

Argued June 4, 1992.
Decided Sept. 24, 1992.

For Appellant: *Lieutenant Matthew L. Kronisch, JAGC, USNR* (argued); *William H. Foreman, Jr.* (on brief).

For Appellee: *Lieutenant Commander Lawrence W. Muschamp, JAGC, USN* (argued); *Colonel T.G. Hess, USMC* (on brief).

OPINION OF THE COURT

Cox, Judge:

This case requires us to consider whether appellant's court-martial had jurisdiction to hear his case. For the reasons hereafter stated, we conclude that it did.

The history of First Lieutenant Clyde P. Boudreaux's involvement with the military justice system is well docu-

mented in the decision by the United States Navy-Marine Corps Court of Military Review. 33 MJ 649 (1991). His case can be viewed in four parts.

I

Appellant was convicted by general court-martial of various offenses in March 1974, and he was sentenced to be dismissed from the service. His conviction was reviewed by the Court of Military Review pursuant to Article 66(b)(1), Uniform Code of Military Justice, 10 USC § 866(b)(1). In August 1975, that court affirmed his conviction in part, reversed in part, and authorized the convening authority to order a rehearing on the case. Appellant then petitioned this Court for review of the decision on October 31, 1975. The Government moved to dismiss the petition on the grounds that it was premature because final action had not been taken by the lower court. We dismissed the petition on December 4, 1975, on the ground that it was "premature." 23 USCMA 728.

II

Critical to the issue in this appeal, appellant's rehearing was conducted 2 days before this Court dismissed appellant's petition. No objection was made by appellant to the rehearing, and no motion was made for a stay or continuance pending this Court's decision. At the rehearing, appellant was convicted again of most of the offenses before that court-martial and was sentenced to be reprimanded, to pay a fine of $1,000, and to lose 2,950 places on the promotion list. The case was not returned to the Court of Military Review; rather, it was sent directly to the Judge Advocate General of the Navy for review pursuant to Article 69, UCMJ, 10 USC § 869. One can only surmise that it was not returned to the Court of Military Review

because the sentence on rehearing was outside the ordinary and mandatory review of that court. The Judge Advocate General affirmed the conviction and sentence. The case was forwarded to the U.S. Navy-Marine Corps Appellate Review Activity for the ministerial act of "finish filing" in the Federal Records Center at Suitland, Maryland.

III

According to the decision below and attributed to "legend," it appears that "a clerk . . . was so offended by the review of this case . . . that she clandestinely refused to 'finish-file' it . . . and, instead, deposited it in a box marked 'Questionable Cases,' where it remained for ten years." 33 MJ at 651. It was eventually discovered and sent to the Navy-Marine Corps Court of Military Review "for completion of appellate review" under Article 66 on July 1, 1986. *Id.*

The interim appellate history is interesting but not of moment to the question now before us. *See United States v. Boudreaux,* 26 MJ 879 (NMCMR 1988); *Boudreaux v. United States Navy-Marine Corps Court of Military Review,* 28 MJ 181 (CMA 1989). Ultimately, the Court of Military Review affirmed appellant's conviction and sentence on rehearing. 33 MJ 649 (1991).

IV

At long last, we granted appellant's petition for review. We limited our review to one legal issue:

> WHETHER APPELLANT'S REHEARING OF 2 DECEMBER 1975 LACKED JURISDICTION WHEN THE CASE WAS PENDING BEFORE THE COURT OF MILITARY APPEALS ON THE DAY OF THE REHEARING.

Prior to our resolution of the granted issue, we will first look at the military justice system envisioned by Congress in the Uniform Code of Military Justice. Articles 1-140, 10 USC §§ 801-940. We find that it can be likened unto a time-line. The alpha of the line is the commission of an offense by a servicemember; the omega is final review of the court-martial conviction by the Supreme Court of the United States. Where that case lies along the time-line determines what can be done with the criminal prosecution of that offense and who can do it.[1]

A gross simplification of the system will help the uninitiated understand the time-line involved. A prosecution in the military justice system is initiated by the signing of charges under oath. Art. 30, UCMJ, 10 USC § 830; RCM 307, Manual for Courts-Martial, United States, 1984. The charges are investigated and ultimately referred to a court-martial convened by a convening authority. Arts. 32 and 34, UCMJ, 10 USC §§ 832 and 834, respectively; RCM 405, 407, and 601. Upon referral to a court-martial, a military judge and members are detailed to the court-martial. *See generally* Arts. 25 and 26, UCMJ, 10 USC §§ 825 and 826, respectively; RCM 501 and 503. The court-martial retains jurisdiction over the case from the point of referral until the record is authenticated by the military judge, unless the convening authority withdraws the case. Art. 54, UCMJ, 10 USC § 854; RCM 604, 801, 805, 1009, 1104. After the record is authenticated, it is sent to the convening authority who may approve or disapprove any or all of the findings and sentence. Art. 60, UCMJ, 10 USC § 860 (1983); RCM 1104 and 1107. To the extent a sentence "as approved" by the convening authority meets jurisdictional limits set by Congress, a convicted service-

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[1] As a practical matter, where the record of trial happens to be has a lot to do with "what can be done . . . and who can do it."

member will have his case reviewed by a Court of Military Review (Art. 66) unless he waives that right (Art. 61, UCMJ, 10 USC § 861; RCM 1110). After review by a Court of Military Review, a servicemember may petition the United States Court of Military Appeals, "on good cause shown," to hear the case. Art. 67(a)(3), UCMJ, 10 USC § 867(a)(3)(1989); RCM 1204. *If* the United States Court of Military Appeals grants an appellant's petition, then the case may be further appealed to the Supreme Court.[2]

There is a lot that can happen to a particular case along the way which moves the case faster or slower along the time-line and in and out of the ordinary sequence of wickets, or may even send it backwards.[3] Thus, we are often confronted with the question of who has jurisdiction to do what at any particular time.[4] This case is a perfect example.

In an attempt to make it precisely clear who has jurisdiction of a particular case, whether on appeal or otherwise before either a Court of Military Review or the United States Court of Military Appeals, we hold as follows.

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[2] As noted, this description of the court-martial process is a simplification of an otherwise complex system. There are many variables which affect a case such as the type of court-martial to which the charges are referred, the resulting sentence, and the post-trial action by the convening authority. One extremely interesting variable is that an accused can only seek review by the Supreme Court if the Court of Military Appeals has decided his case. Art. 67a, Uniform Code of Military Justice, 10 USC § 867a.

[3] This case illustrates but one of the many actions which can move the case backwards along the time-line rather than forward. Other examples are government interlocutory appeals under Article 62, UCMJ, 10 USC § 862; petitions for extraordinary relief pursuant to the All Writs Act, 28 USC § 1651(a); mistrials; withdrawn charges; and post-trial evidentiary hearings.

[4] Jurisdiction is used here in the generic sense of the word. In a "court-martial" system, the word "authority" may be more clearly descriptive.

First, every matter which comes before an appellate court can be viewed as either an interim (interlocutory) or a final appeal. It does not matter if (1) jurisdiction is conferred upon that court by operation of the Uniform Code of Military Justice, such as by Articles 62, 66, 67, or 69; (2) whether jurisdiction is found in the All Writs Act, 28 USC § 1651(a); or (3) whether it lies under some other equitable concept. *See United States Navy-Marine Corps Court of Military Review v. Carlucci,* 26 MJ 328 (CMA 1988). The primary question is whether the appeal is from a *final judgment* below or whether it is an *interim appeal.*

If it is a final appeal, jurisdiction *vis-a-vis* the appeal lies with the appropriate appellate body. Article 66 makes it quite clear that a Court of Military Review obtains jurisdiction to review a case by referral of a Judge Advocate General. Art. 66(b). However, what constitutes a *final judgment* of a Court of Military Review has never been completely resolved.

One reason that controversy has surrounded the question of whether a judgment of a Court of Military Review is appealable is because the Uniform Code of Military Justice does not define finality. Article 67 (1989) provides three avenues of appeal from decisions of a Court of Military Review:

> (a) The Court of Military Appeals shall review the record in—
>
> (1) all cases in which the sentence, as affirmed by a court of Military Review, extends to death;
>
> (2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
>
> (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

The statute is ambiguous. The triggering mechanism permitting an appeal to the United States Court of Military Appeals is the fact that a case has been "reviewed." In an attempt to give meaning to this word, we held in *United States v. Best,* 4 USCMA 581, 584, 16 CMR 155, 158 (1954) [*Best* I], that "Congress intended this Court to review a decision by a board of review [now Court of Military Review] only if it has finally acted on both the findings and the sentence." However, we soon modified this narrow view of "finality" as applied to government appeals under then Article 67(b)(2) (Article 67(a)(2) since 1989). *United States v. Papciak,* 7 USCMA 224, 22 CMR 14 (1956).[5]

In *United States v. Best,* 6 USCMA 39, 19 CMR 165 (1955) [*Best* II], we were able to rely upon the lack of finality as defined in *Best* I to conclude that the rehearing of Sergeant Best's court-martial was properly conducted, although his petition for review of the Board of Review decision was pending at this Court at the time. Our rationale was that the first petition was from an interlocutory, as opposed to a final, judgment of the Board of Review.

Today, it is well-settled that this Court will entertain a myriad of interlocutory matters, all of which can materially affect the court-martial. We do not limit our review to cases described in *Best* I or *Papciak*. We consider whether a petitioner has shown "good cause" under Art. 67(a)(3). Thus, questions still remain as to what the lower courts may do while an interlocutory appeal is pending and as to what a final appeal is.

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[5] To the extent that *Best* I can be read as standing for the proposition that the Court of Military Appeals will not hear a case under Article 67(a)(3) unless the findings and sentence have been affirmed, it is expressly overruled.

First of all, we reaffirm the definitions of *finality* as used in *Best* and *Papciak*. Within the meaning of Article 67(a)(1) and (3), "final" means the conviction and sentence are both affirmed. Within the meaning of Article 67(a)(2), "final" means that the Judge Advocate General has ordered the case sent to the United States Court of Military Appeals for review. Once a "final" decision is before this Court for consideration, then the lower courts are divested of legal authority to take any action which would have the effect of diminishing the jurisdiction of this Court. *United States v. Bullington,* 13 MJ 184 (CMA 1982); *United States v. Jackson,* 2 USCMA 179, 7 CMR 55 (1953). Although jurisdiction over the servicemember will continue to lie below for some purposes (such as clemency, or remedial actions such as—vacation of suspended sentences; approval of appellate leave; administrative separations or the like), neither the lower court nor the convening authority can take any action to diminish the higher court's jurisdiction. *See United States v. Bullington, supra.*

Second—interim (interlocutory) appeals, on the other hand, do not divest the lower court or convening authority of the authority to continue the case unless the higher court issues a stay of the proceeding or unless a stay is required by operation of a Rule for Courts-Martial or by law. *See* RCM 908(b); Art. 62.

Applying these rules to the instant case, we conclude that appellant's petition to this Court in October 1975 was an interim (interlocutory) appeal. The action taken by the Court of Military Review did not result in a *final* decision. Although the action of the Court of Military Review did not in any way diminish this Court's jurisdiction to consider appellant's interim (interlocutory) appeal by way of a petition "on good cause shown," the interim appeal did not automatically stay the rehearing or divest that court-

martial from carrying out the mandate of the Court of Military Review.

Appellants (or petitioners) are always free to ask the lower court or to petition the appellate court for a stay of the proceeding below, and of course the Government can refrain from continuing the prosecution pending resolution of the interim appeal.

Thus, we reject appellant's argument that filing a petition for review of an interim decision "completely divests" the court-martial of jurisdiction. The less of *Bullington* and like cases is that the final action in the case will in every instance be reviewable. Once the Court of Military Review has jurisdiction over a case, no action by a lower court or convening authority will diminish it. *Boudreaux v. United States Navy-Marine Corps Court of Military Review,* 28 MJ 181 (CMA 1989). The same holds true before this Court.[6]

V

Two additional matters warrant our consideration. First, appellant asks us in the interest of justice to dismiss the charges and specifications on the equitable theory of laches. In other words, he argues that it is unfair that his appeal took over 17 years to finally mature. While his entreaty is not unreasonable, our review of the record of trial and the result compels us to reject it. In the final analysis, he stands convicted and sentenced for misconduct to which he entered pleas of guilty. We can find no prejudice resulting from the delay in his case.

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[6] We have carefully read the Epilogue contained in the decision of the Court of Military Review. 33 MJ at 658-59. The decision we reach today should answer the concerns expressed therein. The business of military justice can proceed in an orderly manner. Any party who can demonstrate a potential injury has a remedy. It is titled a Motion for Stay of Proceedings.

Secondly, we note that the United States Navy-Marine Corps Court of Military Review consolidated some of the charges and specifications. That court then determined that reassessment of the sentence was not necessary because "the military judge instructed the members that these offenses were multiplicious for sentencing." 33 MJ at 658. We agree that no further relief is necessary.

After many years, we are satisfied that the conviction and sentence of appellant are justified by the facts and the law.

The July 10, 1991, decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Chief Judge (concurring in the result):

The law of the case and the operation of the provisions of the Uniform Code of Military Justice provide the answer to the granted issue. It is that the rehearing of December 2, 1975, properly had jurisdiction over appellant's case notwithstanding the pendency of appellant's premature petition for review in our Court on that same day.

On December 2, 1975, appellant's case was before the convening authority for a rehearing pursuant to a valid remand order authorized by the Code and issued by the Court of Military Review. Art. 66(d), UCMJ, 10 USC § 866(d). Appellant's 1975 petition to our Court failed to properly invoke the jurisdiction of our Court, and this is reflected in our decision at that time to dismiss it as "premature" rather than to deny review. *See* Appendix; *United States v. Boudreaux,* 23 USCMA 728 (1975). Through the proper use of stays or other appropriate applications to higher courts, and a subsequent grant of such motions, appellant could have moved the jurisdiction to another court such as our Court or back to the Court of Military Review.

This was not done. *See also United States v. Henderson,* 34 MJ 174, 175 n. 2 (CMA 1992). Therefore, the rehearing on December 2, 1975, had lawful jurisdiction.

At oral argument in this case and in other cases over the years, I have described a "tunnel of power" theory to illustrate how the UCMJ was wisely constructed by Congress to give jurisdiction to various authorities during a case's progress through the judicial system. If one with a visual sense looks at how Congress intricately constructed the UCMJ to empower various authorities to exercise jurisdiction or power during the judicial process, you can almost see a tunnel (the trial and appellate process) and a train (an accused's case). As the train enters the beginning of the tunnel, the military judge controls the train (appellant's case) as the train moves through this section at the beginning of the tunnel. In this court-martial section, the military judge, not any other authority, has control or power or jurisdiction over the train (the case). At a certain point the UCMJ provisions allow the train (the case) to move to the next section of the tunnel (the section controlled by the convening authority). In this section, only the convening authority has jurisdiction or power over the case.

The case then moves to the other sections of the tunnel controlled by the Court of Military Review or the United States Court of Military Appeals or (since 1984) to the Supreme Court pursuant to the relevant provisions of the UCMJ. When the train (the case) is in a certain portion of the tunnel, the relevant UCMJ provisions describe which authority has control or power or jurisdiction over the case at that time. There are provisions of law where an appellant can get off the train and go to another higher section of the tunnel and request that the train be moved to another section of the tunnel. For example, a petition under the All Writs Act (28 USC § 1651(a)) can, if success-

ful, allow our Court to move the train right on up to our section of the tunnel.

In the instant case, on December 2, 1975, appellant's train was parked in the convening authority's portion of the tunnel because it had been properly sent back by the Court of Military Review under its codal power. A proper request for a stay or a petition under the All Writs Act accompanied by a responsive judicial act could have moved the train to another section of the tunnel. That, however, was not done, so on December 2, 1975, the convening authority had the jurisdiction under the Code to conduct the rehearing.*

Under the law of the case and under the plain provisions of the UCMJ, I join the decision to affirm.

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* The plea to move appellant's train to our Court's section of the tunnel was properly dismissed as premature and his train remained parked down the tunnel.

APPENDIX
UNITED STATES COURT OF MILITARY APPEALS

Docket No. 31,230

UNITED STATES, APPELLEE

v.

CLYDE P. BOUDREAUX, (SS# 435-56-4627),
FIRST LIEUTENANT, U.S. MARINE CORPS, APPELLANT

[FILED DEC. 4, 1975]

ORDER

On consideration of Government Motion to Dismiss Petition for Grant of Review, as the Navy Court of Military Review has not taken its final action in appellant's case, it is, by the Court, this 4th day of December 1975,

ORDERED:

That said Motion be, and the same is, hereby granted. Appellant's petition for grant of review is premature.

For the Court,

cc: The Judge Advocate General
Appellate Defense Counsel
Appellate Government Counsel

WISS, Judge (concurring in the result):

In *United States v. Papciak,* 7 USCMA 224, 22 CMR 14 (1956), this Court more precisely explained its opinion in *United States v. Best,* 4 USCMA 581, 16 CMR 155 (1954). The *Papciak* opinion indicates that a decision of a Board of Review (now Court of Military Review), is "final" if that decision either finally resolves a right of one of the parties or if it resolves such a right in a way as to leave no adequate remedy for the party except appeal. Thus, in that case, the Court found jurisdiction to answer a certified question referred by the Judge Advocate General under then Article 67(b)(2) (Article 67(a)(2) since 1989), concerning the correctness of the Board of Review's decision to order a new staff judge advocate's review [now recommendation] and action by a different convening authority.

Under *Papciak,* then, it is the nature of the Court of Miltary Review's resolution of a party's right which will decide whether the decision is "final," not the mere fact that the Judge Advocate General has sent the case to this Court under Article 67(a)(2).

The August 1975 decision of the Court of Military Review in this case was not a final decision within the ambit of this standard—at least, not from appellant's viewpoint and at least not as it related to a rehearing. Accordingly, while appellant styled his petition to this Court in October 1975 as a petition for grant of review challenging that rehearing, I agree with the majority that it actually was in the nature of an interim, interlocutory appeal. The majority correctly concludes that, without an order from this Court, that interlocutory appeal did not, itself, act to stay the rehearing or to divest the court-martial from conducting the rehearing as the Court of Military Review had ordered.

APPENDIX B

U.S. COURT OF MILITARY APPEALS.

Misc. Dkt. No. 89-11.
CMR Dkt. No. 74-2361.

CLYDE P. BOUDREAUX, FIRST LIEUTENANT,
U.S. MARINE CORPS, PETITIONER,

v.

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW, RESPONDENT.

June 16, 1989.

For Petitioner: *Lieutenant Jeffrey S. Horwitz, JAGC, USNR* (argued); *William H. Foreman, Jr., Esq.*
For Respondent: *Lieutenant Commander Lawrence W. Muschamp, JAGC, USN* (argued); *Captain Wendell A. Kjos, JAGC, USN.*

OPINION OF THE COURT

COX, Judge:

This case is before us upon petitioner's claim[1] that his general court-martial conviction is subject to mandatory

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[1] Petitioner asserts jurisdiction under the All Writs Act, 28 USC § 1651(a); Articles 66 and 69, Uniform Code of Military Justice, 10 USC §§ 866 and 968, respectively; and Rule 4(b)(1), Rules of Practice

review by the United States Navy-Marine Corps Court of Military Review pursuant to the entitlement contained in Article 66, Uniform Code of Military Justice, 10 USC § 866. The appellate history of this case is set out in full in the opinion below. 26 MJ 879 (1988).

In summary, petitioner's original conviction was referred to the Court of Military Review pursuant to Article 66(b). That court affirmed the findings of guilty of three specifications, and reversed as to four others. It then remanded the case to the convening authority authorizing a rehearing on the affected charges and specifications or, in the alternative, a rehearing on the sentence, based on the three affirmed specifications.[2] The convening authority elected to order a rehearing on sentence.

On rehearing, petitioner received a punishment well below the statutory threshold for mandatory review under Article 66(b). *See* 26 MJ at 881. Under the provisions of Article 69 of the Code, 10 USC § 869, the Judge Advocate

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and Procedure, United States Court of Military Appeals. He prays for a Writ of Mandamus requiring the Court of Military Review to review his case under the provisions of Article 66(c). Petitioner has asked alternatively that this Court issue a writ, characterized as a Writ of Habeas Corpus in one part of his pleading and as a Writ of Mandamus in another, directing that his charges be dismissed for "inordinate post-trial review delay" in the appellate process. We find no basis to dismiss the charges in the record before us.

[2] It is noted that Boudreaux petitioned the United States Court of Military Appeals on October 31, 1975, for review of the original decision of the Court of Military Review. The Government moved to dismiss the petition as being untimely because the case lacked finality. On December 4, 1975, this Court granted the motion to dismiss, holding that "[a]ppellant's petition for grant of review is premature." *United States v. Boudreaux,* 23 USCMA 728 (1975). Our holding today is not based on our prior action in this case or the fact that there yet remain three findings of the original decision of the court below which have not yet been subject to review by this Court.

General of the Navy examined the record and upheld the findings and sentence.

As noted in the opinion below, the Judge Advocate General returned the case some 10 years later to the Court of Military Review, requesting consideration of the following issue:

> WHETHER EXAMINATION UNDER ARTICLE 69, UCMJ, IS PRECLUDED IN A REMANDED CASE ONCE JURISDICTION HAS BEEN PREVIOUSLY EXERCISED BY A COURT OF MILITARY REVIEW UNDER ARTICLE 66, UCMJ, EVEN THOUGH THE REHEARING RESULTED IN A SENTENCE THAT NO LONGER MEETS THE JURISDICTIONAL REQUIREMENTS OF ARTICLE 66[(b)], UCMJ.

26 MJ at 881.

In a divided opinion, the Court of Military Review sitting *en banc* held that it had jurisdiction to hear the case, either under a theory of "ancillary jurisdiction" or as an extraordinary writ, but that it was not required to do so. 26 MJ at 882. The court then declined to exercise its jurisdiction. We respectfully disagree with the court's decision in this type of case.

We hold simply that a Court of Military Review which has acquired jurisdiction over a case retains that governance until the decision is either final or has been appealed to the United States Court of Military Appeals pursuant to Article 67(b), UCMJ, 10 USC § 867(b). This is true whether jurisdiction is acquired pursuant to Article 62,[3] 66, or 69; the All Writs Act, 28 USC § 1651(a); or by remand from the United States Court of Military Appeals, to the extent of the terms of the remand. *Cf. United States v. Montesinos,* 28 MJ 38 (CMA 1989).

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[3] UCMJ, 10 USC § 862.

Once jurisdiction is acquired pursuant to Article 66, the Court of Military Review has a statutory duty to review the case to completion unless the accused has waived his right to appeal or withdrawn it.

Our holding is based upon three simple propositions:

First, it is clear that the Uniform Code of Military Justice requires review under Article 66(b) of certain cases. Article 67(b)(3) of the Code further provides that "on good cause shown" the United States Court of Military Appeals shall consider those "cases reviewed by a Court of Military Review." We have been consistent in our position that "Congress did not intend that our jurisdiction be diminished" by actions taken either by Courts of Military Review or convening authorities, which actions may have reduced the sentence adjudged to be less than the original jurisdictional levels. *United States v. Bullington,* 13 MJ 184, 186 (CMA 1982). This case merely extends that doctrine to another set of facts which would lead to the same result as in *Bullington.*

Second, and more importantly, a Court of Military Review retains "ancillary jurisdiction" over a case it has remanded to ensure that it is resolved in a manner consistent with the mandate of the court. *Id.*; *see also, United States v. Wilson,* 20 MJ 335, 336 (CMA 1985). We never intended to limit this exercise of jurisdiction to merely reviewing what had transpired previously. Rather, recognition of jurisdiction was to ensure that the Court of Military Review "affirm[s] only such findings of guilty and the sentence . . . as it finds correct in law and fact and determines, *on the basis of the whole record,* should be approved." Art. 66(c) (emphasis added).

Third, the smooth transition of a case from a Court of Military Review to and from a convening authority, and ultimately to this Court, enhances efficient and orderly administration of the appellate process, and secures for an

accused the right to pursue his statutory remedies with certainty and to a natural conclusion. This fosters confidence in the fairness and integrity of the system as envisioned by Congress. It likewise preserves an accused's appellate rights, without requiring him to file a petition prior to the final action taken by his court-martial.[4]

For the foregoing reasons, the court below improperly "decline[d] to exercise" its jurisdiction in this case." 26 MJ at 882.

The portion of the petition for writ of *mandamus* directing the United States Navy-Marine Corps Court of Military Review to review this case under Article 66(b) is granted. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court of review in accordance with Article 66. That court shall afford petitioner a complete review to determine if the results of the rehearing were "correct in law and fact and . . . on the basis of the entire record, should be approved." Art. 66(c).

The portion of the petition for writ of *mandamus* directing dismissal of the charges against petitioner is denied.

Chief Judge EVERETT and Judge SULLIVAN concur.

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[4] For the very same reasons of economy, efficiency, and orderly administration of the appellate process, we provided for automatic grants of review upon petitions from appellants in those cases where this Court ordered "corrective action" without retaining jurisdiction. Thus, an accused whose petition had been granted once could be assured that his right to approach the Supreme Court of the United States would not be lost by the remand. *United States v. Wynn*, 26 MJ 405, 406 (CMA 1988); Art. 67(h)(1), UCMJ, 10 USC § 867(h)(1).

APPENDIX C

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW.

NMCM 74 2361C.

UNITED STATES

v.

CLYDE P. BOUDREAUX, 435 56 4627,
FIRST LIEUTENANT, (0-2), U.S. MARINE CORPS.

Sentence Adjudged 13 March 1974.
Decided 10 July 1991.

LT Tamara A. Massengale, JAGC, USNR, Appellate Defense Counsel.

William H. Forman, Jr., Civilian Defense Counsel.

LCDR Lawrence W. Muschamp, JAGC, USN, Appellate Government Counsel.

En Banc.

FREYER, Judge:[1]

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[1] By way of disclosure of prior involvement, the author judge, while serving in 1986 as Assistant Director of the Military Justice Division, Office of the Judge Advocate General, upon being consulted about this case by the Head of the Review Branch, made the decision to return the case to this Court for completion of Article 66 review and oversaw preparation of the 1 July 1986 correspondence accomplishing that action. Such involvement was limited exclusively to deciding which channel of appellate review was proper, as between Articles 66 and 69, an issue now finally determined by the U.S. Court of Military Appeals; it did not extend to the inconsistent 4 March 1987 direction for review under Article 69, nor to any substantive issues, nor to any procedural issues now before this Court.

I—STATEMENT OF THE CASE

A. TRIAL

In early 1974, the appellant was brought to trial for numerous offenses and was found guilty by a military judge, contrary to his pleas, of five specifications of violating lawful general regulations (Charge II [Article 92, 10 U.S.C. § 892], Specifications 1-4: borrowing money from enlisted men, and Specification 5: accepting a non-interest-bearing loan from a Marine Corps contractor with whom he dealt in an official capacity); signing a false official affidavit with intent to deceive (Additional Charge I [Article 107, 10 U.S.C. § 907], Specification); and falsely swearing to the same affidavit (Additional Charge II [Article 134, 10 U.S.C. § 934], Specification). He was sentenced to be dismissed from the service.

B. INITIAL REVIEW

After approval of the findings of guilty and the sentence by the convening authority, the case reached this Court for the first time. Our decision, *United States v. Boudreaux,* No. 74 2361 (N.C.M.R. 19 August 1975) (hereinafter "*Boudreaux I*"), after rejecting claims of unlawful command influence, denial of the right to a speedy trial, inadequate Article 32 investigation, and multiplicity between Additional Charges I and II, affirmed the findings of guilty of Charge II and Specification 5 thereof and Additional Charges I and II and their single Specifications, set aside the findings of guilty of Specifications 1-4 of Charge II (on the ground that the military judge had erroneously permitted cross-examination of the appellant on the offenses alleged in those specifications, as to which he had not testified on direct examination), set aside the sentence, and ordered a combined rehearing on Specifications 1-4 of Charge II and the sentence, or, in the alternative, on the sentence only on the basis of the affirmed findings of guilty.

C. REHEARING

The convening authority opted for the combined rehearing. At that rehearing, held on 2 December 1975, the appellant pled guilty to Specifications 1-3 of Charge II and not guilty to Specification 4, was found in accordance with his pleas, and, on the basis of the findings of guilty previously affirmed by this Court and the additional findings of guilty entered by the court-martial on rehearing, was sentenced, this time by members, to be reprimanded, to pay a fine of $1,000.00, and to lose 2,950 numbers on the appropriate lineal list.

D. INITIAL REVIEW OF REHEARING

The convening authority approved the new findings of guilty and the new sentence, ordered the sentence executed, and forwarded the record of trial to the Judge Advocate General, who did not, however, return it to this Court but, because the sentence on rehearing included none of the punishments bringing it within the jurisdiction of this Court, elected to cause it to be reviewed in his Office pursuant to Article 69, UCMJ, 10 U.S.C. § 869. After a determination by the Deputy Assistant Judge Advocate General for Military Justice that the findings of guilty and the sentence were correct in law and fact (sic), the record was sent to the U.S. Navy Appellate Review Activity (NAVARA) (now the U.S. Navy-Marine Corps Appellate Review Activity [NAMARA]) for the ministerial act of "finish-filing" in the Suitland, Maryland, Federal Records Center.

E. SUBSEQUENT EVENTS LEADING TO CURRENT ARTICLE 66 REVIEW

According to legend, a clerk at NAVARA was so offended by the review of this case in the Office of the Judge Advocate General under Article 69 that she clandestinely

refused to "finish-file" it in Suitland and, instead, deposited it in a box marked "Questionable Cases," where it remained for approximately ten years, until it was discovered in early 1986 during the "Promulgation Project" described in *United States v. Myers,* 28 M.J. 191 (C.M.A. 1989). It was taken back to the Military Justice Division of the Office of the Judge Advocate General for a decision as to its final repose. This time, it was decided by the incumbents of that Division that review under Article 69 had been incorrect, and so the record was, on 1 July 1986, at long last returned by the Judge Advocate General to this Court "for completion of appellate review" under Article 66, 10 U.S.C. § 866.

Regrettably, a majority of this Court balked, as is reflected in its opinion in *United States v. Boudreaux,* 26 M.J. 879 (N.M.C.M.R. 1988) (hereinafter "*Boudreaux II*"), and had to be ordered to perform its Article 66 review by the U.S. Court of Military Appeals, *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review,* 28 M.J. 181 (C.M.A. 1989) (hereinafter "*Boudreaux III*"), which granted the appellant a writ of mandamus, thereby, in effect, reversing *Boudreaux II* and sustaining the 1 July 1986 action of the Judge Advocate General of the Navy.

Final repose, however, continues to prove elusive. During consideration of the appeal mandated by *Boudreaux III,* it was brought to the attention of this Court that, before the 1975 rehearing was held, the appellant, apparently unbeknownst to anyone else involved in the rehearing,[2] had placed in military channels a petition for review by the U.S. Court of Military Appeals of *Bou-*

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[2] At least we find nothing in the record of the rehearing to indicate that anyone was aware of it. Specifically, we note that the defense offered no objection to proceeding with the rehearing while the petition was pending.

the findings of guilty, setting aside others and the sentence, and ordering a combined rehearing; and that not until two days after the rehearing was completed did the U.S. Court of Military Appeals dismiss the appellant's petition for review as premature, 23 U.S.C.M.A. 728 (1975)[3]. Thus, the petition for review was pending on the date that the rehearing was conducted, although it appears that the rehearing, and the filing and dismissal of the petition for review, took place entirely independently of and without reference to one another.

In a decision dated 21 May 1990, a panel of this Court, none of whose members is presently serving on the Court, applied the familiar doctrine that the filing of a petition for review immediately transfers jurisdiction over the case to the higher court and, in the process, divests the lower courts of jurisdiction to proceed, citing *Goodman v. Secretary of the Navy,* 21 U.S.C.M.A. 242, 45 C.M.R. 16 (1972), and the venerable *United States v. Jackson,* 2 U.S.C.M.A. 242, 45 C.M.R. 16 (1953). As a result, they reached the conclusion that the court-martial which conducted the rehearing had been without jurisdiction to do so, and that the resulting findings and sentence were null and void.

Suspecting that the panel might have overlooked an exception to the transfer of jurisdiction doctrine, a majority of this Court, on 3 July 1990, granted the government's motion to reconsider the 21 May 1990 panel decision *en banc* and specified issues framing the jurisdictional issue, as we saw it. That action was followed by the filing of

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[3] We note nostalgically the successful Government Motion to Dismiss Petition for Grant of Review prepared and submitted by appellate counsel of that era. Had the contents of that high-quality pleading been heeded by their superiors and successors, the past five years of appellate litigation in this case could, perhaps, have been avoided.

supplementary assignments of error by the appellant. Since our 3 July 1990 order granting the government's motion to reconsider effectively annulled the 21 May 1990 panel decision on the rehearing (but not the 19 August 1975 panel decision in *Boudreaux I*), we undertake a fresh examination of the jurisdictional issue with respect to the rehearing. Our 3 July 1990 order in no wise derogated from the continuing validity, or effected a reconsideration, of *Boudreaux I*; consequently, as a technical matter, no issues regarding the intrinsic correctness of the affirmed findings are presently before us, and the resolutions of the *Boudreaux I* panel that the proceedings were not tainted by command influence, that the appellant was not denied a speedy trial, and Article 32 investigation was adequate are the law of the case. Since the rehearing did result in new findings of guilty as well as a new sentence, we have, nevertheless, out of an abundance of caution, satisfied ourselves beyond a reasonable doubt that neither any of the findings nor the sentence was adversely affected by command influence. *United States v. Thomas,* 22 M.J. 388 (C.M.A. 1986).

II – JURISDICTION TO CONDUCT REHEARING

A.

It is evident from the superseded panel decision, and from the pleadings filed in connection therewith, that a case directly on point and apparently controlling, namely, *United States v. Best,* 6 U.S.C.M.A. 39, 19 C.M.R. 165 (1955), (hereinafter "*Best II*"), was completely missed. In the process of reviewing the government's motion for reconsideration, *Best II* was discovered by a judge of this Court. Although we deem *Best II* to be indeed controlling, we deem it also advisable to address subsequent cases so as to explain why we believe that both *United States v. Best,*

4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954), (hereinafter "*Best I*"), and *Best II* remain as valid precedents even after *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982). In so doing, it is necessary to keep in mind the respective contexts in which *Best I* and *Bullington* arose, and the semantical distinction between jurisdiction over a case and jurisdiction over a particular appeal, the latter raising practical considerations of finality more akin to "ripeness" than pure jurisdiction. *See Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Thus, the real question is not whether, but *when,* the further exercise of such appellate jurisdiction is appropriate.

B.

In *Best I,* the court held that it had no jurisdiction to entertain a petition to review an interlocutory ruling of the Board of Review ordering a partial rehearing on findings and a rehearing on the sentence. Even in so doing, the court, nevertheless, made clear that it was not negating appellate jurisdiction over the case itself, for, although writing in jurisdictional terms, the court concluded its analysis with the sentence: "Consequently, the accused's petition for review of the case by this Court was prematurely filed." 4 U.S.C.M.A. at 585, 16 C.M.R. at 159.

Not only does the term "prematurely filed" more strongly bespeak "ripeness" than jurisdiction, but the court proceeds to reaffirm its ultimate jurisdiction over the case, as follows:

> Although we propose to dismiss the present petition, we desire to make it clear that the accused still has the right to file a new petition as soon as final and complete action on the case is taken by the board of review. Such a petition may properly bring up for

> review all matters of law presented and acted upon by the board of review, including the correctness of its action in ordering a rehearing on one of the charges, while at the same time holding in abeyance its decision with respect to an appropriate sentence. He may also raise the question, presented in the instant petition, as to whether the board of review was correct in holding that the accused was denied effective assistance of counsel on one charge but not on the others. Of course, we express no opinion as to the legal correctness of any of the present determinations of the board of review. Moreover, we express no opinion regarding our power to review a case should a board of review arbitrarily refuse to consider a case before it, or to take action thereon as required by the Uniform Code. Certainly, under traditional practices, a wide variety of action is available to an appellate court to protect and preserve the integrity of a trial. The motion to dismiss the accused's petition for review is granted, without prejudice, however, to his right to file a new petition upon completion of the board of review's consideration of the entire case. The record of trial is returned to The Judge Advocate General of the Army for action consistent with this opinion.

Id. (citations omitted).

This was, of course, precisely the basis for the 1 July 1986 action of the Judge Advocate General of the Navy returning this case to this Court "for completion of appellate review under Article 66[,]" and both *Bullington* and *Boudreaux III* are manifestations of the "wide variety of action" available "under traditional practices" "should a [court of military] review arbitrarily refuse to consider a case before it."

Viewed in this light, neither *Bullington* nor *Boudreaux III* plows new ground, although the opinions in both cases

are instructive in the application of the general principles. There is, however, one sentence in the *Bullington* opinion which, if not placed in proper context and perspective, could undermine *Best I* and *Best II* and thereby seriously threaten "the orderly administration of the appellate process" recognized as a desideratum in *Boudreaux III*. Before dissecting *Bullington,* however, it is advisable, for purposes of comparison, to consider two cases decided after *Best II,* namely, *United States v. Papciak,* 7 U.S.C.M.A. 224, 22 C.M.R. 14 (1956), and *United States v. Johnson,* 21 U.S.C.M.A. 270, 45 C.M.R. 44 (1972).

C.

In *Papciak,* the Court was faced with a situation where the Board of Review had determined that the staff judge advocate's review was prejudicially erroneous, and, as a result, the Board of Review affirmed nothing, set aside the convening authority's action, and returned the case for a new review and action by a different convening authority. It imposed no conditions in its remand on the action that such convening authority might take. The Judge Advocate General appealed this decision by certification, and the accused-appellee moved to dismiss the certificate, citing *Best I.* Whereas, in *Best I,* the Board of Review's partial affirmance and other terms of its remand exerted continuing influence over the proceedings on rehearing, *see United States v. Field,* 5 U.S.C.M.A. 379, 18 C.M.R.3 (1955); *see also United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989), the action of the Board of Review in *Papciak* was different, because it had the effect of returning the case to the *status quo ante* the convening authority's action, nothing less and nothing more. It, thus, also had the potential to lead to an action by the new convening authority which could, we think, remove the case from

appellate review or could surely throw it out altogether.[4] Consequently, Judge Ferguson wrote:

> Without specifically taking issue with the holding in Best, supra—which was concerned with a partial disposition of a case by the board of review—if a board of review action disposes of the entire case at that level, such action is appealable to this Court either by certificate or petition. Here the board of review, despite phraseology to the contrary, acted with finality on the matter before it. If the case is returned to the same or another convening authority, he certainly is in a position to take whatever action he desires—up to and including disapproval of the entire proceedings. Under these circumstances, the board of review action could not be deemed preliminary, interlocutory, or incomplete.

7 U.S.C.M.A. at 227-28, 22 C.M.R. at 17-18.

In *Johnson,* this Court, again without affirming anything or imposing any conditions on remand, set aside the convening authority's and officer exercising general court-martial jurisdiction's actions and returned the

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[4] *But see* the sweeping statement comprising the paragraph of *Boudreaux III* beginning: "We hold simply. . . ." in 18 M.J. at 182. We wonder if that statement is really meant to apply to situations like those in *Papciak* and *Johnson,* in which the Board of Review or Court of Military Review takes no action on any of the findings or the sentence and unconditionally returns the case for a new action. We do not mean to intimate that a Court of Military Review decision setting aside the action of a convening authority *in the process of* ordering even a complete rehearing could ever remove a case from appellate review. We deem an order of rehearing, however, to be fundamentally different from *merely* return a case *unconditionally* for a new convening authority's action, in that the former involves retention of at least a scintilla of jurisdiction, whereas, according to *Papciak* and *Johnson,* the latter does not.

record for a new convening authority's action and such further review as should be indicated. Once again, the Judge Advocate General certified an issue, and the accused-appellee, citing *Best I,* moved to dismiss the certificate. Citing *Papciak*, the U.S. Court of Military Appeals disagreed in the following terms:

> The opinion and action of the Court of Military Review are, indeed, titled, "Interlocutory Order." However, the text of the court's opinion does not disclose any intention to retain jurisdiction over the case. On the contrary, the court set aside both reviewing actions below and directed a "new action," and "such further review" as that action justified. The language in which it effected transfer of the record manifests a purpose to transfer jurisdiction. Judging the court's order by its substance rather than its title, there is no doubt that it decretal provisions effected a final disposition and completed the court's review.

21 U.S.C.M.A. at 271, 45 C.M.R. at 45.

Consequently, we believe that the argument that *Papciak* and *Johnson* have superseded *Best I* and/or *Best II* fails to take into account the critical distinction between a Court of Military Review decision whereby the court orders any kind of rehearing, thereby transferring jurisdiction for a particular purpose while retaining, and thus confirming, appellate jurisdiction over the case generally, *see Montesinos,* or where it affirms anything, thereby also cementing appellate jurisdiction, and a decision whereby the Court of Military Review merely and unconditionally sets aside the initial action, which is the predicate for appellate review, *in toto*, thereby divesting itself of jurisdiction and making its decision final.

The *Papciak* and *Johnson* cases also stand as applications of the practical concept of finality for jurisdictional

purposes, to which we have previously referred. While an appellant, in our system, loses nothing, and can only gain or break even, from a new review and action, the Government stands to lose not only its conviction and sentence but also—even if the new action is a reiteration of the old—any forfeitures collected in the meantime and the time value of any reduction in grade. Hence, these cases illustrate how a Court of Military Review decision may be practically final as to, and thus appealable by, one party but not the other. Whatever effect *Boudreaux III* may have on *Papciak* and *Johnson,* as discussed in footnote 4 of this opinion, we find no cause to believe that *Papciak* and *Johnson* have superseded *Best I* and/or *Best II.* In any event, we now turn our attention to *Bullington.*

D.

In *Bullington,* a special court-martial case, the Court of Military Review affirmed the findings of guilty but set aside the sentence for instructional error and decreed:

> A rehearing on the sentence may be ordered by the same or a different convening authority. If it is determined that such rehearing is impracticable, the convening authority may, without a rehearing, reassess the sentence (set aside subject to this qualification) and approve one that does not include a bad-conduct discharge.

13 M.J. at 185.

In response, the convening authority again approved the sentence but commuted the bad-conduct discharge to additional confinement, whereupon the record was subjected to field review as a "non-BCD" special court-martial. Bullington then petitioned the U.S. Army Court of Military Review for extraordinary relief, claiming that the convening authority's action conflicted with the court's decree.

The Court of Military Review declined to afford the appellant full Article 66 review but entertained the petition to the limited extent of (erroneously) concluding that the convening authority's action had complied with its decree. In disagreeing with the Army Court's refusal to grant full Article 66 review, the *Bullington* court wrote:

> In the case at bar, appellant's petition fits within the statutory language [of Article 67]. Originally, the convening authority approved the findings and the sentence, which included a bad-conduct discharge. The Court of Military Review did review the case and in its original decision affirmed the findings and set aside the sentence as incorrect in law. At that point, all the conditions imposed by Article 67(b)(3) and (d) had been met. So far as we can determine from the record of trial and allied papers, no effort was made after the original decision of the Court of Military Review to serve a copy of the decision upon Bullington and advise him of his right to petition our Court for review. [Footnote omitted.] *However, even at that point, he would have been entitled to petition our Court for review of the action by the court below and to contend that the remedial action taken by the Court of Military Review was inadequate to cure the legal error which it had discovered or that for other reasons more sweeping remedial action was required.* Since Bullington then had a statutory right to petition our Court—even if he was not expressly advised of that right at the time—nothing in the Code allows him to be divested thereof by subsequent action of the convening authority or of the Court of Military Review.

13 M.J. at 186 (emphasis supplied).

We have highlighted the sentence that is of the greatest concern to us, especially the words "even at that point, he would have been entitled to petition[.]" If all that was meant by that statement is that, at that point, Bullington's right *eventually* to petition the U.S. Court of Military Appeals indefeasibly vested (to borrow a term from future interests), the statement is entirely consistent with prior law, as reflected in *Best I* and *Best II*. If, however, what was meant is that a petition would have been "ripe" if filed even before the convening authority had had a chance to comply with the U.S. Army Court of Military Review's decree and the latter had generally reviewed such purported compliance and the legality and appropriateness of the subsequently approved sentence in accordance with Article 66, then a serious conflict with the review process, as we have always known it, including the principles underlying *Best I,* would be engendered. Bearing in mind that the U.S. Court of Military Appeals used the emphatic language it did in *Bullington* in response to a scheme to oust it permanently of jurisdiction over that case (a problem not shared by courts of general appellate jurisdiction, such as the U.S. Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*) and to divest Bullington of his indefeasibly vested right to full appellate review, and with an eye on the consequences of a contrary interpretation, as explained below, we very much prefer to interpret the U.S. Court of Military Appeals' language as a strong defense of its own jurisdiction and of Bullington's right to invoke it, separate and distinct from any "ripeness" issue as to precisely when and how such jurisdiction should, as a practical matter, be able to be invoked.

For the same reasons, we are similarly concerned about the implication in *Bullington* that the Army was in some manner derelict in having failed to serve Bullington with a copy of the first Court of Military Review decision setting

aside his sentence and in having failed to advise him of a right to petition therefrom. The Manual for Courts-Martial, United States, has never provided for service of a Board of Review or Court of Military Review decision which sets aside the sentence, *see* Rule for Courts-Martial (R.C.M.) 1203(c)(2), Manual for Courts-Martial, United States, 1984; and, for whatever it may be worth, the Discussion following R.C.M. 1203(d)(2) in the post-*Bullington* Manual for Courts-Martial, United States, 1984, flatly states:

> The accused may petition the Court of Military Appeals for eview, as to any matter of law, of any decision of the Court of Military Review except: . . . (2) a case in which the Court of Military Review has set aside the sentence. . . .

E.

If, as seems only too likely, the comment in *Bullington* about serving the decision of the Court of Military Review and advising Bullington of his right to appeal refers to the promulgation procedure prescribed in Article 67(c), 10 U.S.C. § 867(c) and R.C.M. 1203(d), it would not only revolutionize current and prior practice but also raise a very troublesome question: *Best I* expressly contemplates that, when a case in which a rehearing was ordered by a Court of Military Review ultimately comes before the U.S. Court of Military Appeals after review of the rehearing by the Court of Military Review that ordered it, one of the issues that the accused may raise is that the rehearing was improperly ordered; and, of course, where some of the findings from the first trial were affirmed at the time the rehearing was ordered, another of the issues that the accused may raise in the U.S. Court of Military Appeals is the legal correctness of those findings.

If, however, as intimated in *Bullington,* a Court of Military Review decision affirming some findings, reversing others, setting aside the sentence, and ordering a combined rehearing is immediately appealable by petition to the U.S. Court of Military Appeals, may the government, by following the Article 67(c) and R.C.M. 1203(d) promulgation procedure and waiting sixty days, force the accused to seek review of any affirmed findings and the order of rehearing at that time or be forever barred by the doctrine of finality or *res judicata* from raising these issues during any later review of the rehearing? Or does the accused get to pick the time when these matters are reviewed? Or can he have them reviewed more than once?

F.

Lest the focus of this question be lost, it is well to refocus on the central issue, which is whether or not the court-martial which held the rehearing ordered by this Court in the appellant's case was divested of jurisdiction to conduct said rehearing by reason of the pendency of the appellant's petition for review when the rehearing took place, followed by dismissal of the petition as "premature."

The law is clear that filing of a petition for review divests lower courts and reviewing authorities of jurisdiction, unless the filing of the petition occurs at an interlocutory stage of the case, *Best II,* causing it to be "premature"; *Papciak* and *Johnson,* in the distinction they draw between themselves and *Best I,* make perfectly clear why orders of rehearing are interlocutory, non-final orders. *Bullington* suggests that an accused is entitled to petition as soon as the Court of Military Review orders a rehearing; yet, in every case, including this one, of which we are aware but one, which will be discussed below, the

U.S. Court of Military Appeals has *dismissed* the petition in like circumstances, and that includes *United States v. Young*, 14 M.J. 233 (C.M.A. 1982) (summary disposition), decided when the ink on *Bullington* was scarcely dry. It should be remembered that the issue involves, not the jurisdiction of the U.S. Court of Military Appeals over a particular case, but merely at what stage of that case a petition will lie.

G.

As it turns out, this is no small matter to "the field," for we shudder to think of the impact on rehearings, which are usually difficult enough under the best of circumstances, and on the intermediate appellate process generally, if interlocutory orders of rehearing by a Court of Military Review were subject to the time-consuming promulgation and petition process, or, worse yet, if a manipulative accused could disrupt a rehearing about to begin or even in progress by wafting a last-minute petition to review the order of rehearing to the U.S. Court of Military Appeals and, thereby, strip the court-martial of its jurisdiction to proceed with the rehearing.[5]

Perhaps the government could protect itself from such an uncontrollable and inconvenient loss of jurisdiction by following the Article 67(c) and R.C.M. 1203(d) promulgation procedure and waiting another sixty days as the lesser of two evils, but, as suggested in sub-part E, the effects of

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[5] Nothing herein is intended to address the availability, at any stage, of extraordinary proceedings, recognized even in *Best I*, which do not automatically transfer jurisdiction and, therefore, in the absence of a stay, do not interfere with matters in progress. Consequently, the jurisdiction of the U.S. Court of Military Appeals could always be invoked to obtain needed relief, albeit not necessarily by a premature Article 67 petition.

employing that procedure at this interlocutory stage are by no means certain.

There is an obvious consistency among *Best I, Best II,* the Code, and the Manual, designed to prevent just such chaos in the intermediate appellate process, which, in our view, should not lightly be disturbed, and this is especially true when there is absolutely no need to do so, because the U.S. Court of Military Appeals' ultimate appellate jurisdiction over the case is guaranteed by *Best I* and *Boudreaux III,* while any necessary emergency intervention during the interlocutory stages can be via an extraordinary writ.

H.

The one case, referred to above, in which a petition was accepted at an interlocutory stage, and in which chaos predictably ensued, is *United States v. Wilson,* 20 M.J. 335 (C.M.A. 1985). In order to understand the chronology of events in that case more fully than is possible from the *per curiam* opinion, we obtained, with the gracious assistance of Ms. Mary Dennis, Deputy Clerk of the U.S. Army Court of Military Review, various documents from the record of proceedings in *Wilson,* which, after affording the parties an opportunity to be heard in opposition, we have ordered attached to the record on appeal in this case, so that we may consider them.

In *Wilson,* after the U.S. Army Court of Military Review had affirmed the findings and, with a minor adjustment, the sentence in Wilson's special court-martial, Wilson petitioned, and the U.S. Court of Military Appeals remanded for consideration of a command influence issue not previously raised. In response, the Army Court again affirmed the findings but set aside the sentence and ordered a rehearing thereon by a different convening

authority. The rehearing on sentence was held on 6 February 1985 and resulted in a sentence not including a bad-conduct discharge, which was acted upon by the convening authority on 17 April 1985; in the meantime, however, Wilson filed a second petition, which was docketed in the U.S. Court of Military Appeals on 20 February 1985.

Had the government appellate counsel in *Wilson* proceeded in accordance with *Best I* and *Young,* they would have moved at once to *dismiss* the 20 February 1985 petition as "premature." Instead, they argued, according to the published opinion, that the case should be *remanded* beause the convening authority had not yet acted on the sentence adjudged upon the rehearing and so the case was not ripe for U.S. Court of Military Appeals consideration. (Insofar as the motion to remand implied recognition that the second petition had been effective to transfer jurisdiction over the case to the U.S. Court of Military Appeals in the first place, it may be deemed procedurally inconsistent with *Best II.* It also strikes us as odd that, while the U.S. Court of Military Appeals accepted the petition and had the case on its docket for nearly eight months, the court observed in a footnote: "The record of trial has not been filed with this Court.") Whether because, in the interim, the convening authority did act, or for some other curious reason, government appellate counsel later moved to withdraw the motion to remand and, instead, moved to dismiss the petition on the ground that the sentence adjudged upon the rehearing precluded appellate review. That contention, of course, flew right in the face of *Bullington,* as well as *Best I,* and got the rebuff it desserved; but that is not the aspect of *Wilson* that interests us.

What does interest us about *Wilson* is that, after denying both the motion to dismiss the petition and the motion to withdraw the motion to remand, the court proceeded to

grant the motion to remand to the Army Court and returned the case to the Judge Advocate General of the Army "for submission to an appropriate convening authority (footnote omitted) for review under Article 64. . . ." The omitted footnote states simply: "We have not been informed whether the convening authority already has acted in the present case."

Our chronology reveals that the convening authority had, indeed, already acted, but that he did so *after* the petition had been filed and docketed in the U.S. Court of Military Appeals and *before* that Court disposed of it; in other words, while the petition was pending. Thus, it would appear that, if the petition was proper, it would have divested the convening authority of his power to act on the record of the rehearing, because jurisdiction would have been transferred to the U.S. Court of Military Appeals. Not only to us do the placement and text of this *Wilson* footnote strongly imply that the U.S. Court of Military Appeals was prepared to accord validity to a convening authority's action taken while this premature petition was pending, but they did also to the Army Court, which accepted the case on remand, without further remanding it to the convening authority, on the ground that the convening authority had already acted.

I.

Consequently, while we are uncomfortable on technical grounds with certain phraseology in *Bullington* and *Wilson*, we view *Wilson* as generally supportive of the *Best II* principle that the filing of a petition in a case which is still in an interlocutory stage does not transfer jurisdiction, or at least does not transfer jurisdiction so completely as to divest inferior tribunals or reviewing authorities of the powers that it would otherwise be appropriate for

them to exercise at the time. The post-*Bullington* summary disposition in *Young* and the "*Cf.*" citation of both *Young* and *Best I* in *United States v. Tucker,* 20 M.J. 52 (C.M.A. 1985), further reassure us that this is still the law, and the summary dismissal of our appellant's petition as premature in 1975 would also seem to establish it as the law of the case.

III – HOLDING AND DISPOSITION

We, therefore, hold that the court-martial which conducted the rehearing at which the new findings and the sentence now before us were adjudged was not automatically divested of jurisdiction by the appellant's unpublicized filing of his premature petition for review, and that the rehearing was a valid legal proceeding conducted by a court-martial having the requisite jurisdiction over the appellant and the subject matter.

Those new findings of guilty and the sentences which were adjudged at the rehearing on 2 December 1975, as approved on review below, are affirmed. Although we are precluded by our order of reconsideration from setting aside any of the findings of guilty affirmed in *Boudreaux I,* we believe that, in accordance with the distinction drawn in *United States v. Sorrell,* 23 M.J. 122 (C.M.A. 1986) (footnote 1), we are not precluded from ordering specifications consolidated. We, therefore, order that Additional Charge I and its Specification be consolidated with Additional Charge II and its Specification. Since the military judge instructed the members that these offenses were multiplicious for sentencing, reassessment of the sentence is not necessary.

IV – EPILOGUE

A United States Court of Appeals, for example, presumptively has appellate jurisdiction over every case pending in a United States District Court within its judicial circuit, waiting only to be invoked by the filing of a notice of appeal. As indicated by the citations in *Best II*, however, not every notice of appeal will invoke its appellate jurisdiction; the appeal must be from an order or judgment deemed final, and finality is determined, not by legal technicalities, but by the practical effect of the judgment or order. *See Cohen v. Beneficial Industrial Loan Corporation; cf. United States v. Jacks*, 8 U.S.C.M.A. 574, 25 C.M.R. 78 (1958).

Although the U.S. Court of Military Appeals does not have, *ab initio*, direct appellate jurisdiction over cases originally pending before courts-martial, *Best I*, *Bullington*, and *Boudreaux III* all establish that the U.S. Court of Military Appeals does have jurisdiction, waiting to be invoked by petition or certification, over all cases which have been reviewed by a Court of Military Review; and, as in the civilian model, it does not derogate from the existence of such jurisdiction in the slightest to recognize a requirement of practical finality before a petition or certificate is deemed sufficient to divest inferior tribunals and reviewing authorities of what would otherwise be their power to act. On the contrary, as we have tried to demonstrate, such a requirement is, we think, essential to maintaining an orderly appellate process.

We, of course, leave to the wisdom of the U.S. Court of Military Appeals the decision on whether or not any judicial chiropractic is needed to align any of the more recent jurisdictional cases with their venerable predecessors. In general, however, we recommend an approach which takes into account the pratice, lone accepted in both mili-

tary and civilian jurisprudence, of limiting interlocutory appeals, because of their well-known disruptive and delaying effects on the progress of litigation and their often merely hypothetical and advisory nature.

Chief Judge WILLEVER, Senior Judges MITCHELL, ALBERTSON, and STRICKLAND, and Judges LANDEN, ORR, HOLDER, JONES, and LAWRENCE concur.

APPENDIX D

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before

R. H. McLERAN R. E. HILTON J. E. RUBENS

NMCM 74 2361S

UNITED STATES

v.

CLYDE P. BOUDREAUX, 435 56 4627
FIRST LIEUTENANT (0-2), U.S. MARINE CORPS

PUBLISH – Decided 21 May 1990

Sentence adjudged 13 March 1974. Military Judge: D. E. Holben. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, FPO Seattle 98773.

LT PETER J. WIERNICKI, JAGC, USNR, Appellate Defense Counsel

LT JEFFREY S. HORWITZ, JAGC, USNR, Appellate Defense Counsel

WILLIAM H. FORMAN, JR., Civilian Defense Counsel

LT TAMARA A. MASSENGALE, JAGC, USNR, Appellate Defense Counsel

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel

RUBENS, Judge:

The history of this case is tortuous but necessary to understand the appellate issues. Contrary to his pleas, a general court-martial composed of a military judge alone convicted appellant (then a First Lieutenant, U.S. Marine Corps) of five specifications of disobeying two lawful general regulations, one specification of false official statement, and one specification of false swearing in violation of Articles 92, 107, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 907, and 934, respectively. The military judge sentenced appellant to a dismissal. The convening authority approved the findings and sentence.

After review under Article 66, UCMJ, this Court affirmed the findings of guilty of Specification 5, Charge II, and of Additional Charges I and II and the specifications thereunder,[1] but set aside the findings of guilty of Specifications 1 through 4 of Charge II and the sentence. We authorized a full rehearing or, in the alternative, a rehearing on sentence on the affirmed offenses only. *United States v. Boudreaux,* No. 74-2361 (NCMR 19 August 1975). Appellant filed a petition for review under Article 67(b)(3), UCMJ, with the Court of Military Appeals on 31 October 1975. The Government filed a motion to dismiss appellant's petition as premature on 20 November 1975. While appellant's petition was pending before the Court of Military Appeals, his successor command held a full rehearing.[2] Pursuant to his pleas, a general court-martial composed of members convicted appellant of Specifica-

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[1] The court-martial acquitted appellant of Charge I and its specification.

[2] The legal effect of the "findings" made by appellant's original convening authority, before forwarding the record to appellant's new convening authority, are the subject of the first assignment of error.

tions 1 through 3 of Charge II[3] and sentenced him for these and the previously affirmed offenses to a reprimand, loss of numbers, and a $1,000 fine. The sentence did not include a dismissal.[4] On 4 December 1975, two days after the rehearing, the Court of Military Appeals granted the Government's motion and dismissed appellant's petition as premature. The convening authority approved the sentence as adjudged on 29 January 1976, and forwarded the record of trial to the Judge Advocate General of the Navy for review under Article 69(a), UCMJ.

On 14 May 1976, the Judge Advocate General of the Navy found the findings and sentence correct in law and the sentence appropriate. On 1 July 1986, however, more than ten years later, the Judge Advocate General forwarded the record of trial to this Court for "completion of appellate review under Article 66, UCMJ." This court found on 30 June 1988 that we had "ancillary" but "discretionary" jurisdiction[5] and declined to exercise our discretion to review. *United States v. Boudreaux,* 26 M.J. 879, 882 (NMCMR 1988) (*en banc*). This was not the end of the history of this case, however, because the Court of Military Appeals granted appellant's petition for extraordinary relief, held that this Court had improperly declined to exercise jurisdiction, and ordered us to review the record under Article 66, UCMJ. Thus, this record is again before this Court for appellate review after a lapse of nearly fifteen years.

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[3] The military judge dismissed Specification 4, Charge II.

[4] Article 66(b)(1), UCMJ, requires this Court to review the record of trial of a commissioned officer in which the approved sentence includes death, a dismissal, or confinement for 1 year or more.

[5] The ancillary jurisdiction existed because the original sentence adjudged included a dismissal.

Appellant makes three assignments of error. We will discuss the second and third assignments only because our resolution of the second assignment moots consideration of the first. Appellant's second assignment of error is "[t]he findings and sentence should be set aside because the court-martial was without jurisdiction to rehear the case." Appellant observes that his Article 67(b)(3), UCMJ, petition for review was pending before the Court of Military Appeals when the rehearing was held. He cites *Goodman v. Secretary of the Navy,* 21 U.S.C.M.A. 242, 243, 45 C.M.R. 16, 17 (1972), for this proposition: "The placing of a petition under Article 67(b)(3) . . . in military channels vests jurisdiction over the case in this Court and divests jurisdiction of the Board of Review." In *Goodman* the issue was whether the appellant had withdrawn his petition for review by the Court of Military Appeals when he had not formally filed a motion for leave to withdraw. *Goodman* cites *United States v. Jackson,* 2 U.S.C.M.A. 179, 7 C.M.R. 55 (1953), where the Court of Military Appeals held that appellant's personal and deficient petition for review to the Court of Military Appeals, without knowledge of his counsel, nonetheless divested the Board of Review of jurisdiction to review his petition for reconsideration. *See also United States v. Weeden,* 3 U.S.C.M.A. 404, 12 C.M.R. 160 (1953) (remand appropriate when appellant files a petition for review with the Court of Military Appeals while reconsideration petition pending before the Court of Military Review).

The Court of Military Appeals has not reversed or distinguished *Goodman* in the intervening years. In *United States v. Burke,* 4 M.J. 530 (NCMR 1977), this Court cited *Goodman* in discussing the accused's post-trial representation. The Court of Military Appeals held recently in *Stone v. Army Court of Military Review,* 21 M.J. 152, 153 (C.M.A. 1985) (summary disposition) (citing *Goodman*),

that it would grant appellant's motion to withdraw his petition for Article 67(b)(3), UCMJ, review to enable the Court of Military Review to consider his petition for reconsideration. Thus, we find the law in this area well settled. Although the Government makes several novel and interesting arguments against the rule in *Goodman*, these arguments must be addressed by the Court of Military Appeals as they are the source of this rule. We are bound under *stare decisis* by the proposition that appellant's Article 67(b)(3), UCMJ, petition to the Court of Military Appeals, albeit premature and perhaps otherwise deficient, nevertheless divested this Court and logically any inferior tribunal (*i.e.*, the trial court) of jurisdiction to proceed on the rehearing. Appellant's second assignment of error, therefore, is meritorious insofar as it refers to the findings and sentence which this Court set aside.

Appellant's third assignment of error is "[h]e has been denied his right to a speedy review of his conviction and has been prejudiced by the unreasonable delay." Appellant's statement that there is a 5005 day delay between the rehearing and the redocketing of the record of trial at this Court is correct. We disagree that this is unreasonable under the circumstances or prejudicial to appellant and find no merit to the assignment. There is no evidence that appellant was dissatisfied with the Article 69(a) UCMJ, review of his conviction in 1976 and that he sought, through *coram nobis* or otherwise, Article 66, UCMJ, review by this Court. In fact, appellant's record is before this Court for further review only because the Judge Advocate General forwarded it to us for review because of his apparent uncertainty over the proper appellate review channel for this type of case. Moreover, there is no credible evidence of prejudice. We believe that appellant's self-admitted poor civilian education and general court-martial conviction were largely responsible for his employment

difficulties. Appellant states in one of his affidavits that he was discharged in April 1976, and had difficulty the next six months (and perhaps for some period thereafter) in securing suitable employment because prospective employers were concerned that his appeal was still pending. The record clearly indicates, however, that the Article 69(a), UCMJ, review was completed on 14 May 1976, the month after his discharge with several pay. Again there is no evidence that appellant complained about the type or timeliness of the review which he received. His conviction was, in fact, final under the law as it was then understood within two months after his separation. We find no unreasonable delay or prejudice.

There are three remedies to the second assignment of error: first, a full rehearing; second, a rehearing on sentence only; third, affirming a sentence of no punishment. We cannot merely reassess the sentence because the court-martial which conducted the rehearing did not have jurisdiction at that time over the case. Thus, the sentence adjudged is void and, therefore, there is no sentence to reassess. We reject the first two alternatives in the interests of judicial economy and because of the light sentence which was adjudged at the rehearing. Because of the passage of time we have again reviewed the findings affirmed by this Court in 1976 (*i.e.*, Specification 5, Charge II, and Additional Charges I and II and their Specifications) and, finding them correct in law and fact in accordance with Article 66, UCMJ, affirm them. We affirm a sentence of no punishment.

J. E. RUBENS

Senior Judge McLERAN and Judge HILTON concur.

R. H. McLERAN

R. E. HILTON

APPENDIX E

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW.

NMCM 74 2361R.

UNITED STATES

v.

CLYDE P. BOUDREAUX, 435 56 4627,
FIRST LIEUTENANT, (0-2), U.S. MARINE CORPS.

Sentence Adjudged 2 Dec. 1975.
Decided 30 June 1988.

LCDR Alvin L. McDonald, JAGC, USN, Appellate Defense Counsel.

Maj. James Carlson, USMC, Appellate Defense Counsel.

LCDR Lawrence W. Muschamp, JAGC, USN, Appellate Government Counsel.

Lt. Georjan D. Overman, JAGC, USNR, Appellate Government Counsel.

Before the court en banc.

COUGHLIN, Senior Judge:

This case is before us for a second time and, on our own motion, we consider it *en banc*.

Contrary to his pleas before the first general court-martial tried by military judge alone in February and

March 1974, appellant was found guilty of five specifications of violating lawful general regulations under Charge II; one specification of signing a false official statement under Additional Charge I; and one specification of false swearing under Additional Charge II, in violation of, respectively, Articles 92, 107, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 907, and 934. He was acquitted of other charges and was sentenced to be dismissed from the service.

In our opinion dated 19 August 1975, we affirmed the findings of guilty to Charge II and Specification 5 thereunder and to Additional Charges I and II with a single specification under each such charge. The findings of guilty to Specifications 1 thru 4 of Charge II and the sentence were, however, set aside. We returned the record to the convening authority, authorizing him to order a rehearing on Specifications 1 through 4 of the Article 92 violations and on the sentence or, alternatively, to order a rehearing on the sentence only as to the charges and specifications which we had affirmed. *United States v. Boudreaux,* No. 74 2361 (NCMR 19 August 1975).[1]

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[1] On 26 September 1975, the appellant petitioned the Court of Military Appeals (COMA) to review our decision. The Government, in a Motion to Dismiss this petition, asserted that "since this case is presently before the convening authority for rehearing, and since upon rehearing the case will be forwarded to the Navy Court of Military Review for further review, the petition should be dismissed as premature." On granting the Government's motion, COMA, in an order dated 4 December 1975, dismissed the petition for grant of review as "premature." Neither COMA's dismissal nor the grounds the Government proffered therefor are relevant to the issues now before us. Nevertheless, such may have a bearing on COMA's decision of whether to grant any forthcoming petition by the appellant to review our instant decision. In any event, we may not, by our action, divest COMA of its jurisdiction in the case. *United States v. Bullington,* 13 M.J. 184, 186 (C.M.A. 1982).

On 28 October 1975, the convening authority, pursuant to our decision, ordered a rehearing at a general court-martial of Specifications 1 through 4 of Charge II and the sentence. At the rehearing, held on 2 December 1975, the appellant was found guilty pursuant to his pleas of Specifications 1 thru 3 of Charge II.[2] For these offenses and the offenses for which we previously affirmed guilty findings, the appellant was sentenced by court-martial members to be reprimanded, to pay a fine of $1000, and to lose 2950 numbers on the lineal list. The sentence did not include a dismissal from the Naval Service. The convening authority's action on the rehearing approved the sentence as adjudged and directed that "[t]he record of trial [be] forwarded to the Judge Advocate General of the Navy for examination under Article 69, Uniform Code of Military Justice." On 14 May 1976, the Office of the Judge Advocate General (OJAG) reviewed the rehearing pursuant to Article 69, 10 U.S.C. § 869 and determined, "The proceedings, findings, and sentence as approved by the convening authority are found correct in law and fact."

For over ten years the case remained dormant. Then on 1 July 1986, the Judge Advocate General returned the record of trial to the Navy-Marine Corps Court of Military Review "for completion of appellate review under Article 66" of the UCMJ on the basis that OJAG review of the rehearing of a case initially reviewed by our Court under Article 66, 10 U.S.C. § 866 would appear to be precluded by the plain wording of Article 69. In separate correspondence, dated 4 March 1987, the Judge Advocate General requested that in our consideration of the case, the Court give attention to the following issue:

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[2] The Government declined to go forward on Specification 4 and that specification was dismissed by the military judge.

WHETHER EXAMINATION UNDER ARTICLE 69, UCMJ, IS PRECLUDED IN A REMANDED CASE ONCE JURISDICTION HAS BEEN PREVIOUSLY EXERCISED BY A COURT OF MILITARY REVIEW UNDER ARTICLE 66, UCMJ, EVEN THOUGH THE REHEARING RESULTED IN A SENTENCE THAT NO LONGER MEETS THE JURISDICTIONAL REQUIREMENTS OF ARTICLE 66(c), UCMJ?

We next ordered appellate counsel to brief the above issue and the following analogous issue:

WHETHER THIS COURT MAY OR MUST NOW ACT IN THE ABOVE-ENTITLED CASE UNDER ARTICLE 66, UNIFORM CODE OF MILITARY JUSTICE, NOTWITHSTANDING THE PRIOR EXAMINATION OVER 10 YEARS AGO OF THE RECORD OF TRIAL IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL UNDER ARTICLE 69, UCMJ?

We answer the first issue in the negative. That is, OJAG review under Article 69 is not precluded solely because we previously reviewed the case under Article 66, UCMJ. Neither the plain language of Article 69[3] nor its legislative

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[3] Article 69 was amended between the time OJAG initially reviewed this case in 1976 and the present. The pertinent portion of Article 69 at the time of the OJAG review read as follows:

> Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided by section 866 of this title (article 66), shall be examined in the office of the Judge Advocate General.

Currently, Article 69 reads thusly:

> The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be

history requires a contrary conclusion. Accordingly, Article 69 review by OJAG is appropriate in a remanded case under the same circumstances as if we had not previously reviewed the case, provided we do not exercise our ancillary jurisdiction as discussed below.

Having decided that OJAG was authorized to act under Article 69, the crux of the second issue is whether we are now required or permitted to act under Article 66. We conclude that we are permitted to do so, but are not required to.

Once we exercise jurisdiction under Article 66, as in the instant case, we retain ancillary jurisdiction to review cases which have been returned to the trial court or to the convening authority for additional proceedings—regardless of the sentence adjudged or approved below after their return. *United States v. Wilson,* 20 M.J. 335, 336 (C.M.A. 1985) (citing *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982)). As the Court of Military Appeals noted in *Wilson,* "the appellate court [the Court of Military Review] should be allowed to determine if its initial decision has been properly applied and enforced."

The exercise of this ancillary jurisdiction, however, is discretionary. That is, although empowered to do so, we are not required to again exercise jurisdiction over a case that, upon rehearing, falls below the sentence threshold for our mandatory review under Article 66(b)(1), UCMJ.[4]

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examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61).

[4] Article 66(b)(1) of the UCMJ makes review of a court-martial record of trial by a Court of Military Review (CMR) mandatory in each case "in which the sentence, as approved, extends to death, dismissal of a commissioned officer, . . . dishonorable discharge or bad-conduct discharge or confinement for one year or more. . . ."

Furthermore, we normally will refrain from exercising our ancillary jurisdiction in such cases unless the mandate in our original action directed that the record be returned for further review. If return of the record is not so mandated, the review of such remanded cases need only comply with the procedures for review set forth in the UCMJ and the Manual as if we had not previously entertained the case for review. *See* Articles 64 and 69, UCMJ, 10 U.S.C. § 864, and R.C.M. 1112 (Review by a judge advocate) and R.C.M. 1201 (Action by the Judge Advocate General). Should the convening authority or the military judge upon rehearing fail to comply with our mandate the accused may seek remedial action from us by means of a petition for extraordinary relief or otherwise.

The question therefore arises as to whether we should exercise our ancillary jurisdiction in the instant case. Our mandate in the original action did not direct that the case be returned to us for further review, the convening authority strictly complied with our mandate, the case was thereafter reviewed by the OJAG pursuant to Article 69, and there appears to be no other good reason to disturb the finality of the decision.

Accordingly, we decline to exercise our jurisdiction in this case. The record of trial is returned to the Judge Advocate General for appropriate disposition in accordance with this decision.

Chief Judge BYRNE, Senior Judge RILEY and Judges MIELCZARSKI and RUBENS concur.

GLADIS, Judge (dissenting):

I dissent because I disagree with the Court's refusal to exercise our mandatory jurisdiction under Article 66 to review this case.

The issues presented are, first, whether examination under Article 69, Uniform Code of Military Justice (UCMJ), is precluded in a remanded case once jurisdiction has been previously exercised by a Court of Military Review under Article 66, UCMJ, even though the rehearing resulted in a sentence that no longer meets the jurisdictional requirements of Article 66(b), and, second, whether this Court may or must now act in this case under Article 66, UCMJ, notwithstanding the prior examination over 10 years ago of the record of trial in the Office of the Judge Advocate General under Article 69. I conclude that examination under Article 69 is precluded in these circumstances and that this Court must exercise its continuing jurisdiction under Article 66.

The facts are set forth in Judge Coughlin's opinion.

The version of Article 69 in effect when the convening authority forwarded the record of trial for examination under that Article in 1976 provided that every record of trial by general court-martial, in which there had been a finding of guilty and a sentence, the appellate review of which was not otherwise provided for by Article 66, would be examined in the Office of the Judge Advocate General. The current version of Article 69, enacted by the Military Justice Act of 1983, provides that the record of trial in each general court-martial that is not otherwise reviewed under Article 66 shall be examined in the Office of the Judge Advocate General if there is a finding of guilty and the accused does not waive his right to appellate review under Article 61, 10 U.S.C. § 861.

The version of Article 66(b) in effect when the convening authority forwarded the record to the Judge Advocate General for examination under Article 69 in 1976 provided that the Judge Advocate General would refer to a Court of Military Review the record in each case of trial by court-martial in which the sentence, as approved,

affected a general or flag officer or extended to death, dismisal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. The current version of Article 66(b), enacted by the Military Justice Act of 1983, provides that the Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more, and, except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under Article 61.

Unless the sentence approved by the convening authority extends to death, a punitive discharge, or confinement of one year or more, jurisdiction does not vest in the Court of Military Review. Article 66(b), UCMJ; *United States v. Montesinos,* 24 M.J. 682 (A.C.M.R. 1987). Courts of Military Review have jurisdiction to review cases which have been returned to the trial court or the convening authority for additional proceedings—regardless of the sentences adjudged or approved below after their return. *United States v. Wilson,* 20 M.J. 335, 336 (C.M.A. 1985) (citing *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982)). Once appellate jurisdiction has properly vested, it continues until completion of appellate review. *United Stes v. Montesinos, supra.* Just as we cannot divest the Court of Military Appeals of its jurisdiction, so the court below or the convening authority cannot divest us of ours. *See United States v. Browers,* 20 M.J. 356, 358 (C.M.A. 1985).

The plain meaning of Article 69 is that only those cases which are not reviewable by a Court of Military Review under Article 66 may be properly examined in the Office

of the Judge Advocate General under Article 69. The Judge Advocate General does not have discretion to refuse to forward for review under Article 66 a case reviewable under Article 66. Therefore, examiantion of the cae before us by the Judge Advocate General under Article 69 was not proper.

A Court of Military Review's appellate jurisdiction under Article 66 is mandatory. *United States v. Roettger,* 17 M.J. 453, 457 (C.M.A. 1984). In the absence of a proper waiver by the accused of his right to appellate review or withdrawal of his appeal under Article 61, the Court must exercise such jurisdiction. The accused in this case cannot waive appellate review or withdraw his appeal because he was tried before the effective date of the Military Justice Act of 1983 which permits waiver or withdrawal. P.L. 98-209, 12(a)(4). Therefore, the Court must review the case. Whether the accused or the Judge Advocate General desires it to do so is irrelevant. *See United States v. Cain,* 5 M.J. 698 (N.C.M.R. 1978). Indeed, whether the Court itself desires to review the case is irrelevant. The refusal of the Court to exercise its appellate jurisdiction under Article 66 in this case means that the accused's conviction is not final under Article 76, UCMJ, 10 U.S.C. § 876, because appellate review has not been completed. The suggestion of the Court that cases remanded in the future need not be returned for completion of appellate review unless the Court has so directed on remand means that these cases will not be final. I dissent from the Court's refusal to exercise its mandatory appellate jurisdiction in this case.

Judge ALBERTSON joins in Judge Gladis' dissent.

CASSEL, Judge (dissenting):

To the extent that the only issue before us is whether this case must be reviewed by this Court under Article 66,

Uniform Code of Military Justice (UCMJ), I disagree with the majority decision. I also disagree with the new method of review which the majority opinion has created by its fiat.

First, the question presented by the forwarding of this case from the Judge Advocate General is only whether this Court must review it under Article 66, UCMJ, when after a rehearing, the case was mistakenly reviewed by the Office of the Judge Advocate General—purportedly under Article 69, UCMJ. The answer to this narrow issue is dictated by the chronology of this case. The opinion of this Court was dated 19 August 1975. The mandate from the Judge Advocate General to the original convening authority (Appendix I) ordered that the record be returned. (At that time 0122 of the Manual of the Judge Advocate General required that *all* General Court-Martial cases be forwarded to the Navy-Marine Corps Appellate Review Activity, Office of the Judge Advocate General, Washington, D.C.) On 4 December 1976, the appellant petitioned for review by the Court of Military Appeals. That petition was dismissed as being premature because this Court had not taken final action. (*See* Appendix II). The majority concedes that under the rules announced in *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982), and *United States v. Wilson,* 20 M.J. 335 (C.M.A. 1985), we cannot, by our action, preclude normal review by the Court of Military Appeals. The *normal* avenue of appeal to that Court, however, is Article 67, UICMJ, which requires a decision by this Court under Article 66. Thus, we *must* review this case in the normal course of review, *i.e.,* Article 66. So the answer to the question presented by the Judge Advocate General is, in this case at least, yes. Examination under Article 69 is precluded.

Before discussing the theory of review created by the majority, I simply note that I agree completely with Judge

Gladis that there exist two alternate and exclusive methods of reviewing general court-martial cases and that there is *no* discretion vested in the reviewing body to determine which way review will take place. That is dictated by statute and depends solely on the sentence adjudged and approved. *See* Article 66 and 69, UCMJ. Judge Gladis and I disagree, however (*see United States v. Sullivan,* No. 86 3698R (N.M.C.M.R. 31 July 1987), because I believe that in the situation where this Court does not specifically order the return of a remanded case, that case should be reviewed as a normal case within the statutory scheme, *i.e.,* further review will be dependent upon the sentence adjudged at the rehearing and approved by the convening authority. *Cf. United States v. Wilson,* 20 M.J. 335 (C.M.A. 1985), and *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982).[1] In those cases the Court of Military Review under Article 66, and which had been returned by that court to the convening authority for further action, *could* be reviewed again by the intermediate appellate court. . . ." *Wilson,* 20 M.J. at 336 (emphasis added). Under Article 66(c) & (c), this Court is empowered to set aside the findings and sentence in any given case and order a rehearing. I read *Wilson* and *Bullington* as standing for the proposition that the Court of Military Review can, as part of its power under Article 66, order that a remanded case be returned to that court for review upon completion of the rehearing. I do not read those cases as giving to the Court of Military Review a power not already existing in the current statutory scheme.

The basic problem with the majority position is that it creates an undefined and unstructured power of discretion

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[1] In this regard, it is interesting to note that *United States v. Montesinos,* 24 M.J. 682 (A.C.M.R. 1987), is currently before the Court of Military Appeals. *See* 26 M.J. 207 (C.M.A. 1988).

in the Courts of Military Review that has *no* basis in law and which plays havoc with the concept of finality of decisions and review.[2] In effect, the majority finds that a case which this Court has remanded and returned for a rehearing is reviewable under either Article 66 or Article 69 depending on whether or not we wish to "permit" review by the Judge Advocate General to suffice in lieu of our review. The problem is, however, who is to ask if we permit this—and when? As an example, suppose that, upon review, we affirm only some of the findings and order a rehearing on either the remaining findings and sentence or the sentence alone, and the sentence upon rehearing does not meet the threshold requirements for jurisdiction to attach under Article 66, and the case is ultimately reviewed by the Judge Advocate General and complains that his case has not been reviewed by the Court of Military Review. He is not satisfied with the response and petitions us to appoint counsel and review the case. He then promptly dies. Must the proceedings be abated and charges dismissed? *See United States v. Roettger,* 17 M.J. 453 (C.M.A. 1984).

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[2] For example, when can an accused petition this Court for a "grant of review?" from the time the sentence is adjudged? after an unsatisfactory review by the Judge Advocate General under Article 69? Furthermore, does this Court now have plenary power to grant or deny review? Are there any standards to determine what should be reviewed? It is noted that the Courts of Military Review Rules of Practice and Procedure do not contain any provision concerning petitions for review under Article 66.

APPENDIX F

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20370

IN THE U.S. NAVY COURT OF MILITARY REVIEW

Before

H. HOPPE, III R. W. GLASGOW
MICHAEL PATRICK MURRAY

NCM 74-2361

UNITED STATES

v.

CLYDE P. BOUDREAUX, 435 56 4627
FIRST LIEUTENANT (0-2), U.S. MARINE CORPS

Sentence adjudged 13 March 1974
Decided 19 August 1975

Review pursuant to Article 66(c), UCMJ of general Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, FPO Seattle, Washington

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LT Michael C. Barr, JAGC, UNSR, Appellate Defense Counsel

LT J. W. Malley, Jr., JAGC, USNR, Appellate Government Counsel

DECISION

HOPPE, Senior Judge:

Tried to the general court-martial bench, Lieutenant Boudreaux was convicted, contrary to his plea, of four counts of borrowing money from three different enlisted men; of accepting a loan from a man doing Marine Corps vehicle repair business with him; of making a false official statement and affidavit, and of false swearing. He was acquitted of other charges. The adjudged sentence to a dismissal was approved by the convening authority.

The following alleged errors were initially assigned:

I. COMMAND INFLUENCE WAS IMPROPERLY UTILIZED TO PRESSURE APPELLANT'S DEFENSE COUNSEL INTO WITHDRAWING HIS REQUEST FOR AN INDISPENSABLE WITNESS AT APPELLANT'S PRETRIAL INVESTIGATION.

II. SPECIFICATION 5 OF CHARGE II SHOULD HAVE BEEN DISMISSED BECAUSE MR. YAMASHIRO WAS NOT MADE AVAILABLE FOR CROSS-EXAMINATION AT THE PRETRIAL INVESTIGATION.

III. ADDITIONAL CHARGE II SHOULD BE DISMISSED AS BEING MULTIPLICIOUS WITH ADDITIONAL CHARGE I.

Subsequently, three supplemental assignments of error were filed and they are:

IV. THE APPELLANT WAS DENIED HIS RIGHT TO A "SPEEDY TRIAL."

V. IF THIS HONORABLE COURT CAN NOT RESOLVE THE ISSUE OF COMMAND INFLUENCE, IT IS RESPECTFULLY REQUESTED THAT A HEARING BE ORDERED TO IN-

VESTIGATE THE MATTER, UNITED STATES V. DU BAY, 17 USCMA 147, 37 CMR 411 (1967).

VI. THE MILITARY JUDGE ERRED WHEN HE RULED THAT THE TRIAL COUNSEL COULD CROSS-EXAMINE THE ACCUSED ABOUT ALL OF THE OFFENSES, R. 153, MCM, par. 149*b*(1) (Rev. ed. 1969).

The record evidences that the director of the law center concerned with the processing of this case deplorably and unnecessarily attempted to disabuse the defense counsel from the exercise of witness rights at the time of the Article 32 investigation. Up to this point the defense counsel may not have been as diligent as he should have been with regard to securing the presence of the witness or at least being kept informed of his duty status, but the actions attributed to the director were uncalled for. However, the defense counsel was not intimidated and although the requested witness did depart for a new duty assignment in another foreign country, and thus did not testify at the Article 32 investigation, there is no basis in fact for the assertion of the inference that the witness was moved out of country to preclude his testifying. Appellant suffered no apparent prejudice, substantial or otherwise, by the unbecoming conduct of the director who, incidentally, was placed on report for the incident by the defense counsel. The issue was not raised at the trial level and is without merit.

With regard to the second assigned error, we conclude that the Okinawan National witness was properly determined to be unavailable and that Lieutenant Boudreaux suffered no prejudice at either the investigation or the trial because the investigating officer concluded the investigation without obtaining his presence.

In the exercise of our discretion, we decline to dismiss Additional Charge II.

Neither the first nor second supplemental assigned errors warrants granting relief to appellant.

Lieutenant Boudreaux testified during the defense case in chief, but his testimony did not embrace all of the offenses charged against him. On cross-examination the trial counsel exceeded the scope of direct examination, the defense counsel objected, and was overruled.

> "DC: Object again, Your Honor. I believe Trial Counsel is getting directly into the Specifications 1, 2, and 3. Especially Specification 3 under Charge II, which is outside the scope of direct examination.
>
> MJ: Well, I didn't understand that you were limiting his testimony. Consequently the trial counsel can explore all of them if he so desires. Did you intend that he limit his testimony?
>
> DC: Yes, sir, I did. I intended to not go into the first four Specifications under Charge II.
>
> MJ: Well, you would have had to say so. You put the accused on the stand without limiting his testimony and the trial counsel can explore all of the offenses.
>
> DC: Very well, Your Honor.
>
> MJ: Your objection is overruled."

The ruling was clearly erroneous. See par. 149*b*, MCM 1969 (Rev.) pg 27-55. The impact of the ruling is difficult to assess and perhaps could be viewed as nonprejudicial if the information elicited could be viewed only as impeaching. However, we find merit to the defense assignment of error on this point. Accordingly, the findings of guilty of specification 1 through 4 of Charge II and the sentence are set aside.

The findings of guilty of Charge II and specification 5 thereunder, and Additional Charges I and II and the single specification under each are affirmed.

The record is returned to the convening authority. A rehearing may be ordered on specification 1 through 4 of Charge II and on the sentence, or, in the alternative, a rehearing on the sentence only may be ordered as to those charges and specifications above in which the findings of guilty are affirmed.

/s/ H. Hoppe, III
H. HOPPE, III

Judge MURRAY and Judge GLASGOW concur.

/s/ Michael Patrick Murray
MICHAEL PATRICK MURRAY

/s/ R. W. Glasgow
R. W. GLASGOW

APPENDIX G

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may be Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX H

10 U.S.C. §826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military

judge is a member and many perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

APPENDIX I

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial,

the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of

mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(c) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members.* Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) *Determination.* The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members

to understanding the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the

president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

APPENDIX J

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the

Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. ATWOOD

☆ U.S. GOVERNMENT PRINTING OFFICE: 1992—337-014/70015

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-1078

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLYDE BOUDREAUX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-12a, is reported at 35 M.J. 291. An earlier opinion of the Court of Military Appeals, Pet. App. 15a-19a, is reported at 28 M.J. 181. Opinions of the Navy-Marine Corps Court of Military Review, Pet. App. 20a-42a and 49a-60a, are reported at 33 M.J. 649 and 26 M.J. 879. Other opinions of the Navy-Marine Corps Court of Military Review, Pet. App. 43a-48a and 61a-65a, are not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. The petition for a writ of

certiorari was filed on December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial in 1974, petitioner was convicted of violating lawful general regulations, signing a false official affidavit, and false swearing in violation of Articles 92, 107, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 907, and 934. Petitioner was sentenced to dismissal. On appeal, the Navy-Marine Corps Court of Military Review rejected four assignments of error, but concurred in another. The court set aside the findings of guilty to four specifications of violating 10 U.S.C. 892, set aside the sentence, and remanded the case for a rehearing on those four counts and on the sentence for all of the charges. Pet. App. 61a-65a. At the rehearing, petitioner pleaded guilty to only three of the four specifications and was sentenced to a reprimand, a fine of $1,000, and a loss of 2,950 numbers on the appropriate lineal list.[1]

Because petitioner's case no longer included any punishments bringing it within the jurisdiction of the Navy-Marine Court of Military Review, the case was reviewed and affirmed by the Office of the Judge Advocate General, pursuant to 10 U.S.C. 869. The case was then misplaced for ten years, but subsequently discovered and sent to the Navy-Marine Corps Court of Military Review for review pursuant to 10 U.S.C. 866.

The Navy-Marine Corps Court of Military Review declined to exercise what it then deemed to be merely its ancillary jurisdiction and returned the case to the Judge

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[1] A reduction on the lineal list is a lowering of an officer's precedence for all purposes of quarters priority, board, and court seniority, and all other seniority privileges, including actual promotion. Petitioner retains his original position for purposes of consideration for retention or promotion.

Advocate General. Pet. App. 49a-54a. The Court of Military Appeals, on an application for mandamus, directed the Navy-Marine Corps Court of Military Review to review the case. Pet. App. 15a-19a. The court of military review then affirmed the conviction and sentence on rehearing. Pet. App. 43a-48a. The Court of Military Appeals affirmed the decision of the court of military review. Pet. App. 1a-12a.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.[2]

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and, therefore, has waived his claim under the rules of military procedure. Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[3] Petitioner also did not

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[2] This Court has denied certiorari on that question twice this Term. *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992); *Williams* v. *United States*, cert. denied, 113 S. Ct. 379 (1992); see also *Bolado* v. *United States*, cert. denied, 113 S. Ct. 321 (1992) (applying same principle to the selection of judges on the courts of military review). There is no reason to treat the petition in this case differently.

[3] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and,

raise this claim in the Navy-Marine Corps Court of Military Review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner, therefore, cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s].") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[4]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found

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unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[4] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" ~~on the~~ issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

Freytag to be "one of those rare cases in which we should exercise our discretion to hear petitioners'challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court.

Second, there is no conflict among the circuits on the question presented by the petition. The Court of Military Appeals and two courts of military review have rejected the claim raised by petitioner. *United States* v. *Weiss*, No. 67869/MC (C.M.A. Dec. 21, 1992); *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992). No federal appellate court has ruled to the contrary.

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992)

(No. 92-273). We rely upon our brief in opposition in that case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1993

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[5] We have supplied petitioner's counsel with a copy of our brief in opposition in *Allen*.